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Indiana Law Journal

Volume 29 | Issue 3

Article 11

Spring 1954

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Recommended Citation

(1954) "Misapplication of the Parens Patriae Power in Delinquency Proceedings," *Indiana Law Journal*: Vol. 29: Iss. 3, Article 11.
Available at: <http://www.repository.law.indiana.edu/ilj/vol29/iss3/11>

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MISAPPLICATION OF THE PARENS PATRIAE POWER IN DELINQUENCY PROCEEDINGS

The rise and development of juvenile court systems throughout the United States are characteristic of new trends which marked the turn of the century.¹ Social legislation, once frowned upon by champions of individualism, was universally accepted and became a necessary element of modern social organization.² Modern juvenile court legislation is founded upon solid social and humane bases, for the general purpose of these laws is to protect children who are in definite need of care. Therefore, modern juvenile statutes extend the protection of the state to dependent, neglected and delinquent children.³ Unfortunately, the general desirability of such legislation has, however, caused law makers and courts to broaden the scope of applicability of these enactments unreasonably. Thus, certain children may be deprived of their freedom without sufficient justification.⁴ Dismissal of arguments contesting the con-

1. The populist movement, the rise of socialism, and the introduction of progressive reform measures in most phases of American life are indicative of new trends in thought; the doctrine that the government should be a positive agent in promoting human welfare was accepted by millions of Americans.

2. Social legislation in various forms became an essential part of American life. Workmen's compensation acts were passed in forty-two states between 1900 and 1920. Labor regulations limiting the number of hours for woman and child labor were enacted in most states. On the national scale, the Interstate Commerce Act and the Sherman Antitrust Act typify the trend toward federal regulation of business. BARCK AND BLAKE, *SINCE 1900* 36-37 (1947).

3. Children who have been abandoned and are without adequate means of support are classified as dependent. The courts are directed to assume responsibility for their care through public welfare agencies or foster homes. *E.g.*, IND. ANN. STAT. §§ 9-3205—9-3206 (Burns Supp. 1953); CAL. W. & I. CODE ANN. § 700 (1937); ILL. ANN. STAT. c. 19, §§ 19.081-19.087 (1947); *Bradburn v. Bradburn*, 209 Ind. 61, 197 N.E. 905 (1935); *In re Cordy*, 169 Cal. 150, 146 Pac. 532 (1914). Where the parents neglect legally recognized duties owed by them to their children, the court will declare the infant to be a neglected child and remove him from the harmful environment created by the parents. Neglected children receive similar care to those who are dependent. IND. ANN. STAT. § 9-3215 (Burns Supp. 1953); CONN. GEN. STAT. §§ 2802 *et seq.* (1949); ILL. ANN. STAT. c. 19, §§ 19.081-19.087 (1947); *Board of Children's Guardians v. Gioscio*, 210 Ind. 581, 4 N.E.2d 199 (1936); *In re Creely*, 70 Cal. App.2d 186, 160 P.2d 870 (1945); *People v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952). Children who have committed acts amounting to the commission of crimes or other serious misconduct are adjudged delinquent, and they may be placed on probation or confined to a state institution for juveniles. IND. ANN. STAT. § 9-3215 (Burns Supp. 1953); CAL. W. & I. CODE ANN. § 700 (1937); ILL. ANN. STAT. c. 19, § 19.088 (1947); TENN. CODE ANN. § 10271 (1934); *State v. Geckler*, 214 Ind. 574, 16 N.E.2d 875 (1938); *Freestone v. State*, 98 Ind. App. 523, 176 N.E. 877 (1931); *Ex parte Willis*, 30 Cal. App. 188, 157 Pac. 819 (1916); for a thorough discussion of the subject, see LOU, *JUVENILE COURTS IN THE UNITED STATES* 52-55, 167-172 (1927).

4. There are critics who look with skeptical eyes at the achievements of modern juvenile legislation and raise serious questions as to its constitutionality. Eastman and Cousins, *Juvenile Court and Welfare Agency: Their Division of Function*, 38 A.B.A.J. 575 (1952); Elrod and Melaney, *Juvenile Justice: Treatment or Travesty?*, 11 U. of

stitutionality of the juvenile court acts is particularly regrettable in that the objectionable irregularities do not advance the acts' fundamental purposes and could be corrected without substantially impairing the effectiveness of the law.

The protection of dependent and neglected children is not an innovation of juvenile court legislation⁵ since care for such infants has been provided through courts of chancery from the earliest periods of the common law.⁶ The state protected the interests of children by caring for them if the parents were unfit, unwilling, or unable to do so.⁷ In such cases, the state stepped into the parents' shoes and acted as a guardian of the child.⁸

The truly revolutionary feature of modern juvenile court legislation is the extension of state authority through civil and equity courts to cases involving children charged with committing acts of a criminal nature.⁹ The jurisdiction of the juvenile court in this instance is probably a product of a civic conscience revolting against the inhuman aspects of post-conviction treatment accorded youthful offenders.¹⁰ During the nine-

PITT. L. REV. 277 (1950); Lindsey, *The Juvenile Court from a Lawyer's Standpoint*, 52 ANNALS 143 (1914); Olney, *The Juvenile Courts—Abolish Them*, 13 CAL. B.J. 1 (April-May 1938).

5. The common law doctrine that the state is the ultimate parent of all infants who require its care and protection acquires its basis from feudal traditions in England when the king in his capacity of *parens patriae* assumed general protection of all infants in his kingdom through his chancellor. Lou, *op. cit. supra* note 3, at 3.

6. The care of all infants is lodged in the king as *parens patriae*, and by the king this care is delegated to his court of chancery. Idiots and lunatics, who are incapable of taking care of themselves, are provided for by the king as *parens patriae*; there is some reason to extend this care to infants. *Eyre v. Shaftsbury*, 2 P. Wms. 103, 118, 24 Eng. Rep. 659, 664 (1722).

7. The earlier cases were chiefly concerned with children of wealth who were taken away from immoral parents because they were unfit to provide proper juvenile training. Property, however, was not a requirement for chancery jurisdiction. See *Cowls v. Cowls*, 8 Ill. 435 (1846); *Wellesley v. Wellesley*, 2 Bligh N.S. 124, 4 Eng. Rep. 1078 (1828); *Shelley v. Westbrook*, Jacob 266, 37 Eng. Rep. 850 (1821); *Creuze v. Hunter*, 2 Cox 242, 30 Eng. Rep. 113 (1790).

8. Parental rights have never been considered inalienable, and the parent was held to have forfeited such rights when the court found that the child did not enjoy the reasonable care due him. *Schleuter v. Canatsy*, 148 Ind. 384, 47 N.E. 825 (1897); *Nugent v. Powell*, 4 Wyo. 173, 33 Pac. 23 (1893); *In re Moore*, 11 Ir. Com. L. 1 (1859).

9. Modern juvenile court statutes give the juvenile courts jurisdiction over delinquent children. The statutory definition of delinquent children includes infants charged with the commission of criminal acts. See note 3 *supra*.

10. Under early common law rules only a child younger than seven years of age was immune from criminal prosecution, for it was assumed that he was incapable of forming the requisite *mens rea*. Children over seven years old were tried in criminal courts; and if proven criminally responsible, they were subjected to the same punishments which were primarily designed for hardened adult criminals. Children over fourteen years of age were treated as adults. HOLDSWORTH, A HISTORY OF ENGLISH LAW 438 (1926). In the 17th century an eight year old boy was hanged for arson, and in 1833 the death sentence was pronounced upon a child who broke a pane of glass

teenth century, action was taken in certain states to improve the care and treatment given children after conviction;¹¹ but, in spite of minor advances, young offenders were always tried in general criminal courts.¹² In 1899, however, the Illinois Juvenile Court Law put an end to the exclusive jurisdiction of criminal courts over juveniles.¹³ Illinois' progressive precedent was soon followed by other states until now all save two have separate juvenile courts.¹⁴ Under modern statutes, a child accused of committing a criminal act, except one punishable by life imprisonment or death, is within the original and exclusive jurisdiction of the juvenile court.¹⁵ If the child is found guilty of committing the act alleged, he will be declared a delinquent.¹⁶ The court, then, may place the child on probation under the supervision of his parents in their home or may commit the child to any appropriate public institution.¹⁷ If the latter remedy is chosen, the child may be detained until he reaches majority.¹⁸

and stole two pennyworth of paint. GARNETT, *CHILDREN AND THE LAW* 137-147 (1911). There are numerous examples revealing that children in this country received similar treatment. Children over ten years of age were arrested, held in police stations, and tried in the police courts. If convicted, they were usually fined and, if the fine was not paid, sent to the city prison. LATEROP, *The Background of the Juvenile Court in Illinois in THE CHILD, THE CLINIC AND THE COURT* 291 (1925).

11. "In 1869 a Massachusetts law was passed to provide for a 'visiting agent' to sit in on hearings and advise judges regarding disposition of children under sixteen. . . ." Winters, *Modern Court Services for Youths and Juveniles*, 33 MARQ. L. REV. 99 (1949). In 1824, judges in New York could commit children to the "House of Refuge". The treatment of children in the "House of Refuge" was harsh and cruel. It could hardly be distinguished from an ordinary penal institution, but the fact that the place of confinement for children was separate from that provided for adults constituted an improvement of certain significance. Wilkin, *The Responsibility of Parenthood*, 36 ANNALS 64 (1910).

12. HURLEY, *Origin of the Illinois Juvenile Court Law* in *THE CHILD, THE CLINIC AND THE COURT* 320 (1925).

13. Ill. Laws 1899, p. 131. This Illinois Act gave the juvenile court jurisdiction over children under 16 years of age who were charged with the commission of a crime not punishable by death or life imprisonment. Upon a finding of guilt, the act provided that the delinquent child should receive certain forms of beneficial treatment instead of punishment.

14. Juvenile court laws were passed in the five years after 1899 in the following states: California, Colorado, Indiana, Iowa, Maryland, Missouri, New Jersey, New York, Ohio, Pennsylvania, Wisconsin. By 1927 all but two states, Maine and Wyoming, had such laws, but even they enacted statutes for institutional care of children. Lou, *op. cit. supra* note 3, at 21-24.

15. IND. ANN. STAT. § 9-3101 (Burns Supp. 1953); CAL. W. & I. CODE ANN. § 825 (1937); PA. STAT. ANN. tit. 11, § 244 (1939).

16. Violation of state law or commission of an act which, if committed by an adult, would be a crime not punishable by death or life imprisonment is ordinarily required for a finding of delinquency. Also acts of a noncriminal nature, such as begging in the public, associating with vicious persons, and deserting one's home, may lead to such a finding. IND. ANN. STAT. § 9-3204 (Burns Supp. 1953); CAL. W. & I. CODE ANN. § 700 (1937); N.Y. SOC. WEL. LAW § 371.

17. IND. ANN. STAT. § 9-3215 (Burns Supp. 1953); CAL. W. & I. CODE ANN. § 740 (1937); N.Y. SOC. WEL. LAW § 430.

18. IND. ANN. STAT. § 9-3216 (Burns Supp. 1953); CAL. W. & I. CODE ANN. § 740; (1937); N.Y. SOC. WEL. LAW § 430.

As articulated by legislatures, the purpose of such commitment is not penal but educational.¹⁹

The Indiana Juvenile Courts Act is the result of an evolutionary process culminating in modern legislation²⁰ which is intended to afford a means by which a child may receive the guidance and control that should have been provided by his parents.²¹ While a basic tenet of criminal law espouses equal punishment for all who are guilty of the same violation,²² the principle underlying the juvenile court procedure emphasizes treatment of the individual, thus necessitating variations according to the circumstances of the child.²³ Therefore, under the Indiana Act, criminality is not involved in juvenile court proceedings, and the processes of justice do not climax in punishment but in treatment.²⁴

19. Most juvenile court acts state expressly that their purpose is not penal but educational or correctional. *E.g.*, IND. ANN. STAT. § 9-3201 (Burns Supp. 1953); N.Y. SOC. WEL. LAW § 425. This contention has been generally upheld by the courts. *Heber v. Drake*, 68 Ind. App. 448, 118 N.E. 864 (1918); *Commonwealth v. Fisher*, 213 Pa. 48, 62 Atl. 198 (1905); *Childress v. State*, 133 Tenn. 121, 179 S.W. 643 (1915).

20. The first modern Indiana juvenile court statute extending the jurisdiction of juvenile courts to delinquent children was passed in 1903. Ind. Acts 1903, c. 237. Under this Act juvenile courts did not have exclusive jurisdiction over delinquent children. The Act did provide for jury trial on demand. *Id.* § 3. The 1903 Act was superseded by Acts 1941, c. 233, which gave exclusive and original jurisdiction to juvenile courts in cases of dependent, neglected, and delinquent children. *Id.* § 5. Appellate review was limited to the sufficiency of findings of fact or evidence to sustain the judgment. *Id.* § 30. *Akers v. State*, 114 Ind. App. 195, 199, 51 N.E.2d 91, 94 (1943). This Section has been declared unconstitutional as an attempt to limit the right to judicial review. *Montgomery v. State*, 115 Ind. App. 189, 57 N.E.2d 943 (1944). The Act of 1945 provides for trial without a jury, Ind. Acts 1945, c. 356, § 15, and directs that appeal be made in the manner utilized in criminal cases. *Id.* § 21.

21. The purpose and basic principle of the Act is "to secure for each child within its provisions such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interests of the state; and when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents." IND. ANN. STAT. § 9-3201 (Burns Supp. 1953).

22. "Thus, it may be stated that, from a formal viewpoint, the rules of substantive criminal law (consisting of certain propositions found in statutes, ordinances, regulations, judicial and administrative decisions and the like) exhibit a distinctive structure: (a) a clause describing . . . a 'crime' . . . , (b) a clause describing a punitive sanction . . . and (c) a verb meaning 'must' or 'shall be' . . . which joins the two clauses. The union of these elements results in judgments signifying that upon the occurrence of the described harms, the specified punishments must be applied to the offenders." HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 9 (1947). See also Bogen, "Justice" *Versus "Individualized Treatment" in the Juvenile Court*, 35 J. CRIM. L. 249 (1944).

23. "Two assumptions are tacitly implied in this point of view. The first is that modern methods in the diagnosis and treatment of delinquency are sufficiently effective to bring about a successful adjustment in all or most of the cases which come before the juvenile court. The second assumption is that by adjusting the individual the welfare of the community will be adequately protected." *Id.* at 250.

24. The purpose of the juvenile court law is not punishment for the crime committed by the child but the saving of the child from a criminal future. *State v. White* Circuit Court, 225 Ind. 602, 608, 77 N.E.2d 298, 301 (1948); *Freestone v. State*, 98 Ind. App. 523, 528, 176 N.E. 877, 878 (1931); *In re Pierson*, 114 Ind. App. 195, 203,

Because the concept of criminality is rejected, standard rules of criminal procedure are also disregarded, including those constitutional safeguards which individuals usually enjoy before a criminal tribunal.²⁵ To facilitate investigation and provide beneficial treatment, procedure in juvenile courts is simple²⁶ and resembles that used in equity.²⁷

The juvenile court act has been attacked as unconstitutional on several occasions.²⁸ Those persons who question its validity insist that commitment to an institution for perpetrating an act of delinquency, which would be a crime if done by an adult, is in reality punishment for violating the law although the Legislature chose to call the commitment treatment. Consequently, such "punishment" is unconstitutional, for it is imposed with a complete disregard for the procedural and substantive rights guaranteed to persons accused of perpetrating a crime—*i.e.*, right to jury trial, public hearing, right against self-incrimination, and establishment of guilt beyond a reasonable doubt. The commitment is denial of liberty without due process of law.²⁹ This contention has been adjudicated in nearly every state, and with the exception of a few early cases the juvenile court acts have been consistently upheld.³⁰ The justification

(*Akers v. State*) 51 N.E.2d 91, 94 (1943); *Heber v. Drake*, 68 Ind. App. 448, 451, 118 N.E. 864, 865 (1918); *Dinson v. Drosta*, 39 Ind. App. 432, 80 N.E. 32 (1907).

25. According to the Fourteenth Amendment of the Federal Constitution, no person can be deprived of his liberty without due process of law. U.S. CONST. AMEND. XIV, § 1. The Indiana Constitution provides for a public jury trial in all criminal cases. IND. CONST. Art. I, § 13. The accused cannot be compelled to testify against himself. IND. CONST. Art. I, § 14. The juvenile court Act provides for the exclusion of the public from hearings, determination of the cases without a jury, and contains no provision extending the privilege against self incrimination to the accused child. IND. ANN. STAT. § 9-3215 (Burns Supp. 1953).

26. The hearings are held in the chambers of the juvenile court room with the general public excluded. IND. ANN. STAT. § 9-3113 (Burns Supp. 1953). They are conducted in an informal manner. *Id.* § 9-3215.

27. "The power conferred upon the juvenile court under this act is of the same character as the jurisdiction exercised by courts of chancery over the person and property of infants." *Dinson v. Drosta*, 39 Ind. App. 432, 434, 80 N.E. 32, 34 (1907). See also *State v. White Circuit Court*, 225 Ind. 602, 77 N.E.2d 298 (1948).

28. It was claimed that children found delinquent were accused of the commission of a criminal act; thus, their commitment constituted a deprivation of liberty without due process of law, for juvenile courts do not comply with constitutionally guaranteed procedural safeguards for criminal trials. *Freestone v. State*, 98 Ind. App. 523, 176 N.E. 877 (1931); *Wilkinson v. Children's Guardians*, 158 Ind. 1, 62 N.E. 481 (1902); *Van Walters v. Children's Guardians*, 132 Ind. 567, 32 N.E. 568 (1892); *Heber v. Drake*, 68 Ind. App. 448, 118 N.E. 864 (1918); *Dinson v. Drosta*, 39 Ind. App. 432, 80 N.E. 32 (1907).

29. *State v. White Circuit Court*, 225 Ind. 602, 608, 77 N.E.2d 298, 301 (1948); *Dinson v. Drosta*, 39 Ind. App. 432, 80 N.E. 32 (1907). The argument is emphatically stated in the dissenting opinion to *People v. Lewis*, 260 N.Y. 171, 179-184, 183 N.E. 353, 356-358 (1932).

30. *Ex parte Januszewski*, 196 Fed. 123 (C.C.S.D. Ohio 1911); *U.S. v. Briggs*, 266 Fed. 434 (W.D. Pa. 1920); *Ex parte King*, 141 Ark. 213, 217 S.W. 465 (1919); *Ex parte Ah Peen*, 51 Cal. 280 (1876); *In re Brodie*, 33 Cal. App. 751, 166 Pac. 605

of such commitment logically flows from the recognition of the state's *parens patriae* power.³¹ Presently, the courts justify the use of this power

(1917); *Cinque v. Boyd*, 99 Conn. 70, 121 Atl. 678 (1923); *Taylor v. Means*, 139 Ga. 578, 77 S.E. 373 (1913); *Rooks v. Tindall*, 138 Ga. 862, 76 S.E. 378 (1912); *Ex parte Sharp*, 15 Idaho 120, 96 Pac. 563 (1908); *Lindsay v. Lindsay*, 257 Ill. 328, 100 N.E. 892 (1913); *Wisenberg v. Bradley*, 209 Iowa 813, 229 N.W. 205 (1929); *In re Turner*, 94 Kan. 115, 145 Pac. 871 (1915); *Marlowe v. Commonwealth*, 142 Ky. 106, 133 S.W. 1137 (1911); *Farnham v. Pierce*, 141 Mass. 203, 6 N.E. 830 (1886); *Robison v. Wayne Circuit Judges*, 151 Mich. 315, 115 N.W. 682 (1908); *In re Peterson*, 151 Minn. 467, 187 N.W. 226 (1923); *State v. Brown*, 50 Minn. 353, 52 N.W. 935 (1892); *Bryant v. Brown*, 151 Miss. 398, 118 So. 184 (1928); *State v. Buckner*, 300 Mo. 359, 254 S.W. 179 (1923); *State v. Tinch*, 258 Mo. 1, 166 S.W. 1028 (1914); *State v. Burnett*, 179 N.C. 735, 102 S.E. 711 (1920); *Ex parte Watson*, 157 N.C. 340, 72 S.E. 1049 (1911); *Prescott v. State*, 19 Ohio St. 184 (1869); *Commonwealth v. Fisher*, 213 Pa. 48, 62 Atl. 198 (1905); *Childress v. State*, 133 Tenn. 121, 179 S.W. 643 (1915); *Ex parte Bartee*, 76 Tex. Cr. 285, 174 S.W. 1051 (1915); *Mill v. Brown*, 31 Utah 473, 88 Pac. 609 (1907); *In re Johnson*, 173 Wis. 571, 181 N.W. 741 (1921); *State v. Scholl*, 167 Wis. 504, 167 N.W. 830 (1918); *State v. Parsons*, 153 Wis. 20, 139 N.W. 825 (1913).

Early cases striking down juvenile legislation are: *People v. Turner*, 55 Ill. 280 (1870); *Mansfield's Case*, 22 Pa. Superior Ct. 224 (1903).

31. Courts also found juvenile court proceedings to be authorized under the police power of the state. In such instances juvenile court legislation has been compared with statutes requiring compulsory education and those authorizing the appointment of guardians or trustees to administer property of children incapable of managing their own affairs. *Ex parte Januszewski*, 196 Fed. 123, 127 (C.C.S.D. Ohio 1911). See *Ex parte Liddell*, 93 Cal. 633, 640, 29 Pac. 251, 253 (1892); *Nicholl v. Koster*, 157 Cal. 416, —, 108 Pac. 302, 303 (1910); *State v. Marmouget*, 111 La. 225, 227, 35 So. 529, 533 (1903). Also, authority of the state to confine delinquent children has been likened to its power to commit the insane to safely guarded institutions. In *Ex parte Ah Peen*, 51 Cal. 280 (1876), the authority to commit children to training schools was compared to the public authority to supervise and control those who are, by reason of lunacy, among other reasons, incapable of properly controlling themselves. See *Ex parte Watson*, 157 N.C. 340, 352, 72 S.E. 1049, 1053 (1911); *Prescott v. State*, 19 Ohio St. 184 (1869). While these arguments seemingly have some merit, it is doubtful whether this rationale can be logically extended so far as to present complete justification for the unconstitutional shortcomings of juvenile court acts, for it is well established that state statutes based upon the police power must be reasonable and not arbitrary. *Nashville C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935); *Jones v. Portland*, 245 U.S. 217 (1917); *Lawton v. Steele*, 152 U.S. 133 (1894). Therefore, the validity of the court's comparison of such statutes and the juvenile court act may be determined by contrasting the reasonableness of the various acts. Statutes providing for compulsory education generally contain specific provisions as to the duties of parents and children. IND. ANN. STAT. §§ 28-505—28-505K (Burns Supp. 1953); ILL. ANN. STAT. c. 123, § 123.1222 (1946); N.Y. EDUC. LAW § 3212. These obligations cannot be varied by an individual judge; they represent a set of statutory obligations which have been established as reasonable.

While compulsory school laws affect individual liberties to some degree, this deprivation of liberty is so small when balanced against the huge social benefit of the law that the reasonableness of such legislation has not been seriously challenged and has been unanimously upheld. *State v. Bailey*, 157 Ind. 324, 61 N.E. 730 (1901); *Lally v. Fritz Henry*, 85 Iowa 49, 51 N.W. 1155 (1892); *People v. Ewer*, 141 N.Y. 129, 36 N.E. 4 (1894); *Sheers v. Stein*, 75 Wis. 44, 43 N.W. 729 (1889). Whereas the denial of liberty occasioned by the juvenile court law is very similar to, if not identical with, actual punishment, school laws involve no substantial deprivation of liberty and have no punitive character. In cases concerning the mentally ill, the judge cannot disregard the stringent rules of commitment enunciated by statute. The confinement of the mentally ill in a safely guarded institution, where they receive proper medical care, is essential to the public welfare, for such persons of deficient judgment and responsibility

by assuming that if a child commits a criminal act and is found to be a delinquent, he is beyond parental control, and the state must accept responsibility for his welfare.³² However, the commitment of delinquent children to a state institution, which can be justified on the *parens patriae* power of the state, may be a denial of due process if the statute creating the juvenile court fails to conform to the principles essential for the valid exercise of that power.³³

Jurisdiction by the courts over dependent and neglected children has a strong historical basis in the state's power of *parens patriae*, but the extension of this authority to cases of delinquency is a result of legisla-

may endanger the lives or property of their fellow citizens. Also, the condition of the patient himself requires proper medical care for which these institutions are primarily designed. Such restriction is, nevertheless, a confinement and a deprivation of liberty. A judge may not decide, however, in his own discretion, that a person is mentally ill and should be committed to an institution. Use of a jury in mental cases is mandatory in Mississippi, Miss. Laws 1940, c. 231, § 4576, and in Texas, TEX. CONST. Art. I, § 15. It may be demanded in 21 other states. In the remaining states a certain number of physicians or a nonjudicial commission of medical experts has to determine the fact of insanity before commitment can be effected. See Note, 56 YALE L.J. 1178, 1209 (1947).

In Indiana any citizen of the State may institute action for the commitment of a person to a mental institution. IND. ANN. STAT. § 22-1203 (Burns Repl. 1950). Upon the concurring testimony of two competent medical examiners, the judge may order such commitment. IND. ANN. STAT. §§ 22-1204, 22-1207 (Burns Repl. 1950); *In re Mast*, 217 Ind. 28, 25 N.E.2d 1003 (1940); *Treloar v. Harris*, 66 Ind. App. 59, 117 N.E. 975 (1917). A justice of the peace is also authorized to commit insane persons dangerous to the public, but in such a case the fact of insanity must be found by a competent jury. IND. ANN. STAT. §§ 22-1401, 22-1404 (Burns Repl. 1950).

While these precautions may have certain shortcomings, as the value of a jury trial for the determination of mental illness may seem questionable, they prevent the judge from using only his discretion in ordering commitments. For further discussion on the treatment of insane people by the courts, see Note, 3 STAN. L. REV. 109 (1950). In the juvenile court the judge hears the evidence and finds the facts. After an exacting analysis of the statutes allowing the appointment of guardians for children, compulsory school laws, commitment of the insane, and those permitting the confinement of juvenile offenders, all attempts to prove the statutes to be analogous fail. Juvenile court laws grant an unreasonable amount of power to the courts because, unlike other exercises of the police power, they place no precise limitations on the power they grant. Thus, their justification under the police power of the state is untenable.

32. In *People v. Lewis*, 260 N.Y. 171, 176, 183 N.E. 353, 354 (1932), the court said: "To the child delinquent through the commission of an act criminal in its nature, the state extends the same aid, care, and training which it had long given to the child who was merely incorrigible, neglected, abandoned, destitute, or physically handicapped." In *Akers v. State*, 114 Ind. App. 195, 51 N.E.2d 91 (1943), a boy of fifteen years of age was found guilty of stealing an automobile. He had no record of previous misconduct. However, his conduct qualified him as a delinquent, and he was committed to the Indiana Boys' School. The court simply assumed that the child's criminal act was sufficient proof of the inability of the parent to control him. See *Wissenburg v. Bradley*, 209 Iowa 813, 229 N.W. 205 (1929); *Commonwealth v. Fisher*, 213 Pa. 48, 62 Atl. 198 (1905); *Mill v. Brown*, 31 Utah 473, 88 Pac. 609 (1907).

33. An essential element for the valid exercise of the *parens patriae* power is lack of care, protection, or control of the child by the parent. If the statute does not require factual proof of such lack of performance of parental obligations, the *parens patriae* doctrine will fail to justify the actions of the juvenile courts, and the question of denial of due process may arise.

tive policy rather than of legal precedent.³⁴ While there are numerous examples of courts of chancery assuming jurisdiction over children where the conduct of the parents proved they were unfit to care for their children,³⁵ no example exists in the history of the common law wherein equity assumed jurisdiction of a youth charged with the commission of a crime.³⁶ However, the fact that the extension of the *parens patriae* principle to delinquency cases lacks historical basis does not make the application *malum in se*; the overwhelming weight of authority has approved the extension³⁷ by holding that there is no substantial difference in the state's duty to children in dependency, neglect, and delinquency cases.³⁸ In all three instances, the child may be in need of care and protection which the state should provide.

Since exercises of the *parens patriae* power are based upon the child's need for state protection, it is essential that it be firmly established before the courts assume control over the infant. In dependency and neglect circumstances the need of the child arises from the parents' failure to provide proper care;³⁹ however, in delinquency situations the child's need is due to the parents' inability to discipline him.⁴⁰ Thus, proof of some form of parental deficiency is, or should be, a prerequisite to the proper application of the *parens patriae* power in dependency, neglect, and delinquency cases.⁴¹

34. "... [T]he jurisdiction of equity over infants was not a factor in creating ... [juvenile courts]. It arose on the criminal side of the courts because of the revolt of those judges' consciences from legal rules that required trial of children over seven as criminals and sentence of children over fourteen to penalties provided for adult offenders." POUND, *INTERPRETATIONS OF LEGAL HISTORY* 135 (1923). "The view that chancery jurisdiction is not a factor in creating the juvenile court is correct as to the delinquency jurisdiction." LOU, *JUVENILE COURTS IN THE UNITED STATES* 7 (1927).

35. In *Wellesley v. Wellesley*, 2 Bligh N.S. 124, 4 Eng. Rep. 1078 (1828), the father was deprived of the custody of his children because of his immoral conduct. In *Shelley v. Westbrook*, Jacob 266, 37 Eng. Rep. 850 (1821), Shelley, the poet, was denied the right to provide for the education of his children because of his atheistic views.

36. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); Lindsey, *The Juvenile Court from a Lawyer's Standpoint*, 52 ANNALS 143 (1914).

37. This rationale may evidence the courts' recognition of the fact that, by its very nature, progressive legislation cannot be controlled by historical basis.

38. See note 30 *supra*.

39. *Bradburn v. Bradburn*, 209 Ind. 61, 197 N.E. 905 (1935).

40. See note 30 *supra*.

41. The judicial opinion in *Mill v. Brown*, 31 Utah 473, 482-484, 88 Pac. 609, 613-614 (1907), touches on the crux of the problem. "... [A]ll the decisions [upholding juvenile legislation] rest upon the proposition that the state ... has the right ... to substitute itself as guardian ... of the child for that of the parent ... and thus to educate and save the child from a criminal career. ... In other words, [the state must] do that which it is the duty of the father ... to do, and which the law assumes he will do. ... The duty thus rests upon the father first. ... Before the state can be substituted to the right of parent it must affirmatively be made to appear that the parent has forfeited his natural ... right to the custody ... of the child by reason of his failure ... or incompetency to discharge the duty. ..."

When the court upon the facts finds a child to be a delinquent, the question is whether the parent has been derelict in respect to his duty. There is nothing

The procedure provided by the Indiana Act for delinquency actions permits commitments of juveniles where there is doubt concerning the propriety of the *parens patriae* power. In dependency and neglect cases parental deficiency must be conclusively established in court before the child can be taken from his parents.⁴² In delinquency proceedings, however, there is no similar investigation of parental deficiency. The evidence heard in the juvenile court is for the purpose of proving that the particular youth committed the offense alleged.⁴³ Consequently, commitment of an infant under such circumstances is justified only if the court's presumption that the commission of a forbidden act by the child clearly indicates insufficient parental supervision is correct.

Such a presumption seems to be highly arbitrary in view of the fact that the underlying bases leading to the commission of crimes by juveniles may be traced to various sources and might not always be the result of parental unfitness.⁴⁴ The infant's actions may be caused by some emotional instability or influence which the parents could and would be willing to correct.⁴⁵ The child may enjoy the best parental care and still on

up to this point in the proceedings upon which a judgment can be based substituting the state for the parent. Until somehow it is made to appear that the child is not cared and provided for in respect to the matters involved, there exists no reason for the state to take charge of the person of the child.

42. The Indiana Act defines a dependent child as a person under eighteen years of age who is homeless or abandoned. IND. ANN. STAT. § 9-3205 (Burns Supp. 1953). A neglected child is one who has no proper parental care. *Id.* § 9-3206. In both cases the court must find facts sufficient to show that the parents are deficient in providing support for the child before it will extend the protective power and control of the state to him. Statutes of other states have similar provisions; e.g., CAL. W. & I. CODE ANN. § 700 (1937); CONN. GEN. STAT. § 2802 (1949); ILL. ANN. STAT. c. 19 §§ 19.081, 19.087 (Supp. 1953).

43. The Indiana Act defines a delinquent child as a person under the age of eighteen who commits an act, which, if committed by an adult, would be a crime not punishable by death or life imprisonment, or one who violates a state law or commits any of a series of acts enumerated in the statute. IND. ACTS 1945, c. 356 § 4; IND. ANN. STAT. § 9-3204 (Burns Supp. 1953). If the court finds facts sufficient to show that the child falls within the words of the Section, the infant will be adjudged a delinquent child. A child who is found delinquent under Section 4, *ibid.*, may be placed in a State institution for juveniles. *Id.* § 9-3215. Thus, all the court has to find is the actual commission of a single act of delinquency, and the child may be taken from his parents and deprived of his freedom until he reaches his majority. See also CAL. W. & I. CODE ANN. § 700 (1937); ILL. ANN. STAT. c. 19, § 19.088 (Supp. 1953); TENN. CODE ANN. § 10271 (1934).

44. Sheldon Glueck points out the inadequacy of rigid theories which purport to explain criminal causation; he discusses the infinite factors which may lead to delinquency. GLUECK, UNRAVELING JUVENILE DELINQUENCY (1950).

45. The individual child frequently seems to be so played upon by varying internal impulses and environmental influences that his conduct becomes utterly irrational. It would be impossible to say that the behavior reactions fall at all within the broad lines of any typical psychosis. A large number of the infants gradually develop the ability to adjust themselves normally. HEALY, THE INDIVIDUAL DELINQUENT 652 (1915). Evidently the parents should be the first ones called upon to cope with the emotional difficulties of the child. The commission of the act of delinquency is merely an indication of the existence of psychological irregularities in such case and not proof of the need for replacement of the parents.

some particular occasion conduct himself irrationally. In such cases, it seems unlikely that a state institution could provide better protection and training for the child than the willing and able parents. Commitment would be entirely unjustified, for in such a case there is no lack of care and protection. Nevertheless, if the judge believes the child would receive better care in a state institution than at home, he can commit him even if others may reasonably think that the child should remain with his parents.⁴⁶

Thus, the Indiana Act does not require establishment of parental incompetency in delinquency cases. Under the present law, parents do not have an opportunity to rebut the court's presumption that they are derelict in carrying out their duties if their child has committed a delinquent act.⁴⁷ Appropriate correction of this defective feature of the Act would not only remove the grounds for constitutional challenge but would provide protection for the recognized rights of mothers and fathers as the natural guardians of their children as long as they are competent to perform their parental functions. Parents should not be deprived of the custody of their children unless it is conclusively proved in the juvenile court that by reason of their incompetency the best interests of the child require state intervention.

The courts could remedy the situation by statutory interpretation if

46. It has been often recognized that a highly qualified court staff is essential to reasonable and just treatment of juveniles. Consequently, a juvenile court judge must be an exceptional person possessing almost extraordinary abilities. NATIONAL PROBATION ASSOCIATION, *THE JUVENILE COURT OF ALLEGHENY COUNTY (PITTSBURGH) PENNSYLVANIA* 14 (1924). There is no guaranty that any judge will satisfy these exceptional requirements which are admittedly so essential to just and successful handling of juvenile cases. The improbability of having a judge eminently qualified for such work is even more pronounced in view of the fact that in most of the counties of Indiana the juvenile court judge is merely the circuit judge acting in a dual capacity. He is elected for a period of six years, and his election, conceivably, is a result of his qualities to fill the job of a regular circuit judge. Under such circumstances the probability of receiving the best qualified experts of the juvenile field as judges is less than negligible.

Sherwood Norman states in the Yearbook of the National Probation and Parole Association: "In avoiding criminal procedures for children, the juvenile court law bypasses the usual safeguards to individual rights. To compensate for this the court must have adequate staff, trained in the best known methods of handling children with behavior problems. Children are robbed of their rights by the breadth of the juvenile court law if such staff is not available." N.P.P.A. YEARBOOK 1952, 149.

It is not contended that juvenile court judges are making unreasonable decisions or lack qualifications. The argument is that there is a possibility that the judge may, at times, be unreasonable or the staff inadequate; consequently, juvenile cases may be handled arbitrarily, and constitutional rights may be violated.

47. In *In re Pierson*, 114 Ind. App. 195, 51 N.E.2d 91 (1943), delinquency of the child was found when he signed a written confession of guilt to a charge of stealing an automobile. The child had not been in previous trouble, but the juvenile court ordered his commitment to the Indiana Boys' School. The appellate court held that in compliance with the statute the finding of delinquency was sufficient to authorize the court to order commitment. The question of parental inefficiency was not an issue in the hearing.

they would be willing to read into the statute, in the absence of express provisions to that effect, the necessity of proving parental incompetency before committing a youthful offender to a state institution.⁴⁸ Unfortunately, prior Indiana decisions do not indicate that the courts have considered such a view. However, in light of the courts' stand against socialistic and arbitrary administration of the juvenile court law, as reflected in recent decisions,⁴⁹ the proposed interpretation seems attainable.

Amendment of the Act, however, would be a more satisfactory answer to the problem. The Statute should provide that before a child may be committed to a State institution, both the delinquency of the child and the incompetency of the parents must be concurrently established. Under such a law, the parent would have the opportunity to defend his interest in retaining custody of the infant by proving his ability to provide better control of and training for the child than the State could offer through its juvenile institutions. This means a substitution of regular juvenile court proceedings for the discretion of the judge. It can be claimed that such a provision may hamper the facile and informal operation of juvenile courts; however, the protection of the constitutional rights of parent and child justify the imposition of such a burden.

The requirement of finding parental unfitness before committing a delinquent to a public institution is not merely a matter of abstract legal dogmatism with the sole aim of placing the application of the *parens patriae* doctrine upon a technically justifiable basis. Its practical implication is that the best interests of children will be served more effectively if their retention of the benefits of a natural home will not be a matter in the sole discretion of individuals but will be regulated by law. If one single child, whose commitment to the Boys' School would have more harmful than beneficial effects, will avoid such treatment as a result of the requirements of the proposed provision, its adoption is fully justified.

48. In *Mill v. Brown*, 31 Utah 473, 483, 88 Pac. 609, 613-614 (1907), the court held that delinquency of the child and incompetency of the parent must be concurrently found before the child can be taken from the parents and committed to a state institution. The Utah statute had no express provision to this effect, but the court found that in accord with the substantive law of the State the parent cannot be deprived of the custody of his children unless there is affirmative proof that he forfeited his parental rights through unfitness as a guardian for the child.

49. In *In re Coyle*, 122 Ind. App. 217, 101 N.E.2d 192 (1951), the appellate court refused to affirm a juvenile commitment, where there was no evidence to support the particular act of delinquency charged. The court declared: "Juvenile court procedure has not been so far socialized and individual rights so far diminished that a child may be taken from its parents and placed in a state institution simply because some court might think that to be in the best interest of the state." *Id.* at 219, 101 N.E.2d at 193.

It must be noted, however, that had there been sufficient evidence to prove the act of delinquency, the appellate court, in view of precedent, would have affirmed the order of commitment.